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No. 84-1998

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NEW YORK STATE NURSES ASSOCIATION,
Petitioner,

v.

ST. JOSEPH'S HOSPITAL,

and

NATIONAL LABOR RELATIONS BOARD,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Does an employer commit an unfair-labor practice under National Labor Relations Act sections 8(a)(1) and (5) by insisting, as a condition precedent to disclosing or granting access to its financial books and records, in the course of collective bargaining for a successor collective bargaining agreement that the labor organization (1) prove to the employer's satisfaction that the representative whom the labor organization chooses to review the employer's financial books and records possesses certain credentials and meets certain criteria, or (2) negotiate over the necessity or reasonableness of the credentials and criteria demanded by the employer?

PARTIES IN THE COURT BELOW

National Labor Relations Board

St. Joseph's Hospital

New York State Nurses Association

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES IN THE COURT BELOW	ii
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	2
CASE STATEMENT	2
I. STATUTORY BASIS FOR AND HISTORY OF EMPLOYER DISCLOSURE-AND-ACCESS DUTY	3
II. THE INSTANT LITIGATION	5
A. The Board Findings	5
B. The Court of Appeals Proceedings	9
REASONS FOR GRANTING THE WRIT	10
I. THE COURT OF APPEALS DECISION APPARENTLY CONFLICTS IN PRINCIPLE WITH DECISIONS OF THIS COURT SUCH AS *TRUITT* AND *ACME* AND OF OTHER CIRCUIT COURTS AND IT ERODES THE VIABILITY OF ACT SECTION 7'S GUARANTEE THAT ANY APPROPRIATE UNIT OF EMPLOYEES IS ENTITLED TO SELECT REPRESENTATIVES OF ITS CHOICE	10
II. THE QUESTION IS IMPORTANT BECAUSE THE COURT OF APPEALS' DECISION DENIES THE BOARD ITS DUE DEFERENCE	12

TABLE OF CONTENTS—Continued

Page

III. THE QUESTION IS IMPORTANT BECAUSE THE COURT OF APPEALS' DECISION EFFECTIVELY CREATES A WIDE-RANGING OPPORTUNITY FOR EMPLOYERS IN ANY INDUSTRY—NOT MERELY HEALTH CARE—TO FRUSTRATE AND DELAY THE COLLECTIVE BARGAINING PROCESS 12

IV. THE QUESTION IS IMPORTANT BECAUSE THE COURT OF APPEALS DECISION MAKES AN INAPPROPRIATE DISTINCTION BETWEEN EMPLOYEES' REPRESENTATIVES CHOSEN FOR "COLLECTIVE BARGAINING" PURPOSES AND THOSE CHOSEN FOR OTHER PURPOSES 14

CONCLUSION 15

APPENDIX A (Court of Appeals Decision) 1a

APPENDIX B (NLRB (and underlying administrative law judge) Decision) 13a

APPENDIX C (Relevant Statutory Provisions) 40a

TABLE OF AUTHORITIES

Cases Page

Chemical Manufacturers Association et al. v. *National Resources Defense Council, Inc.* and *United States Environmental Protection Agency* v. *National Resources Defense Council, Inc.*, 470 U.S. ——, 84 L. Ed. 2d 90, 106 S. Ct. —— (1985) 12

Detroit Edison Company v. *National Labor Relations Board*, 440 U.S. 301, 59 L. Ed. 2d 333, 99 S. Ct. 1123, 100 L.R.R.M. 2728, 85 CCH Lab. Cas. ¶ 11,129 (1979) 2, 5, 11

Latrobe Steel Company v. *National Labor Relations Board*, 630 F. 2d 171, 105 L.R.R.M. 2393, 89 CCH Lab. Cas. ¶ 12,231 (3rd Cir. 1980), cert. den., 454 U.S. 821, 70 L. Ed. 2d 92, 102 S. Ct. 104 (1981) 13

Metlox Manufacturing Company and International Brotherhood of Operative Potters (AFL-CIO), 153 N.L.R.B. 1388, 59 L.R.R.M. 1657, 1965 CCH NLRB ¶ 9557 (1965), affirmed in *Metlox Manufacturing Company* v. *National Labor Relations Board*, 378 F. 2d 728, 65 L.R.R.M. 2637, 54 CCH Lab. Cas. ¶ 11,719 (9th Cir. 1967), cert. den., 389 U.S. 1037, 19 L. Ed. 2d 824, 88 S. Ct. 771 (1968) 4, 10

George Mick, d.b.a. Yakima Frozen Foods and Local 761, Fruit and Vegetable Packers' and Warehousemen's Union, 130 N.L.R.B. 1269, 47 L.R.R.M. 1472, 61 CCH NLRB ¶ 9753 (1961), affirmed in part and reversed and remanded in part, 316 F. 2d 389, 52 L.R.R.M. 2537, 46 CCH Lab. Cas. ¶ 18,114 (D.C. Cir. 1963) 4

National Labor Relations Board v. *Acme Industrial Co.*, 385 U.S. 432, 17 L. Ed. 2d 495, 87 S. Ct. 565, 64 L.R.R.M. 2069, 54 CCH Lab. Cas. ¶ 11,639 (1967) 2, 11

National Labor Relations Board v. *Action Automotive, Inc.*, 469 U.S. ——, 83 L. Ed. 2d 986, 105 S. Ct. ——, —— L.R.R.M. ——, —— CCH Lab. Cas. ¶ —— (1985) 12

TABLE OF AUTHORITIES—Continued

Page

National Labor Relations Board v. *Bartlett-Collins Company*, 639 F. 2d 652, 106 L.R.R.M. 2272, 90 CCH Lab. Cas. ¶ 12,504 (10th Cir. 1981), cert. den., 452 U.S. 961, 69 L. Ed. 2d 971, 101 S. Ct. 3109 (1981) 13

National Labor Relations Board v. *Bell Aerospace Company Division of Textron, Inc.*, 416 U.S. 267, 40 L. Ed. 2d 134, 94 S. Ct. 1757, 85 L.R.R.M. 2945, 73 CCH Lab. Cas. ¶ 14,465 (1974) 12

National Labor Relations Board v. *Jacobs Manufacturing Company*, 196 F. 2d 680, 30 L.R.R.M. 2098, 21 CCH Lab. Cas. ¶ 66,949 (2d Cir. 1952) .. 4

National Labor Relations Board v. *Truitt Manufacturing Company*, 351 U.S. 149, 100 L. Ed. 1027, 76 S. Ct. 753, 38 L.R.R.M. 2042, 30 CCH Lab. Cas. ¶ 69,932 (1956) 2, 4, 11

Oil, Chemical and Atomic Workers Local No. 6-418 (AFL-CIO) et al. v. *National Labor Relations Board et al.*, 711 F. 2d 348, 113 L.R.R.M. 3163, 98 CCH Lab. Cas. ¶ 10,269 (D.C. Cir. 1983) 5

Plough, Inc. and Local 194, International Chemical Workers Union, 262 N.L.R.B. 1095, 111 L.R.R.M. 1013, 1982-83 CCH NLRB ¶ 15,051 (1982) 5

Tex-Tan, Inc. and Amalgamated Meat Cutters and Butcher Workmen of North America (AFL-CIO), 134 N.L.R.B. 253, 49 L.R.R.M. 1141, 61 CCH NLRB ¶ 10,625 (1961), enforcement denied *National Labor Relations Board* v. *Tex-Tan, Inc.*, 318 F. 2d 472, 53 L.R.R.M. 2298, 47 CCH Lab. Cas. ¶ 18,284 (5th Cir. 1963) 10

Statutes

National Labor Relations Act

§ 2(4) 15
§ 7 3
§ 8(a) 3
§ 8(d) 3

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINIONS BELOW

The opinion of the National Labor Relations Board (and the underlying opinion of the Board administrative law judge) is reported at 269 N.L.R.B. No. 147, and is reproduced as Appendix B at pp. 13a-39a, *infra*. The opinion of the United States Court of Appeals for the Second Circuit denying enforcement of the Board's order is reported at —— F.2d 1937, and is reproduced as Appendix A at pp. 1a-12a, *infra*.

JURISDICTION

The Court of Appeals issued its decision on February 14, 1985. The Court of Appeals had jurisdiction under 29 U.S.C. § 160(e). This Court has jurisdiction under 28 U.S.C. § 1254(*l*). By May 6, 1985, order, Justice Thurgood Marshall extended the time to file a petition for certiorari to and including June 14, 1985.

STATUTORY PROVISIONS INVOLVED

This case involves sections 8(a)(1), (5) and 8(d) of e National Labor Relations Act, 29 U.S.C. § 151 *et seq.*, amended. The pertinent provisions are reproduced as ppendix C at pp. 40a-43a, *infra*.

CASE STATEMENT

This petition's purpose is to request that this Court re-ew the Second Circuit Court of Appeals' decision deny-g enforcement of a National Labor Relations Board erein "Board") order directing, *inter alia*, that St. seph's Hospital (herein "Hospital") cease and desist om refusing to bargain in good faith with New York ate Nurses Association (herein "Association"), by de-ing Association's request to have a representative of its oice, who is a certified public accountant, review Hos-tal's financial books and records to investigate the Hos-tal's claimed inability to pay.

The Court of Appeals' decision in this matter effects a parture from the principles establishing an employer's ty to disclose and provide access to presumptively and ncededly relevant information as those principles are unciated in this Court's decisions in *National Labor lations Board* v. *Truitt Manufacturing Company*, 351 S. 149, *National Labor Relations Board* v. *Acme In-strial Co.*, 385 U.S. 432, and *Detroit Edison Company National Labor Relations Board*, 440 U.S. 301, and in bsequent Board and lower court decisions.

The Court of Appeals' decision modified the disclosure-d-access-duty principles and suggests that a labor or-nization is obliged to bargain over and prove to the nployer's satisfaction credentials possessed or criteria et by representatives chosen by the labor organization.

I. STATUTORY BASIS FOR AND HISTORY OF EMPLOYER DISCLOSURE-AND-ACCESS DUTY

National Labor Relations Act (herein "Act") section 7, 29 U.S.C. § 157, provides in pertinent part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . .

and Act section 8(a), 29 U.S.C. § 158(a), provides in pertinent part:

> It shall be an unfair labor practice for an employer
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> . . . [or]
>
> (5) to refuse to bargain collectively with the representatives of his employees, . . .,

and Act section 8(d), 29 U.S.C. § 158(d), defines "collective bargaining" thus:

> . . . to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession . . .

The foregoing Act provisions, in combination, require *inter alia*, that an employer which claims inability to pay must disclose and permit access to its relevant financial

books and records by a representative designated by the exclusive bargaining representative. The general rule was enunciated by this Court in *National Iabor Relations Board* v. *Truitt Manufacturing Company*, 351 U.S. 149, in which this Court, resolving a dispute between the Second and Fourth Circuits, upheld the Second Circuit's holding in *National Labor Relations Board* v. *Jacobs Manufacturing Company*, 196 F.2d 680 (2d Cir. 1952), that an employer claiming inability to pay must produce "whatever relevant information it has to indicate whether it can or cannot afford to comply with the Union's demands" [196 F.2d 684]. In *Truitt*, this Court reversed the Fourth Circuit and upheld the Board's finding that an employer's refusal to permit a union-designated accountant to examine the employer's financial books and records violated the Act.

In *George Mick, d.b.a. Yakima Frozen Foods and Local 761, Fruit and Vegetable Packers' and Warehousemen's Union*, 130 N.L.R.B. 1269 (1961), affirmed in part and reversed and remanded in part, 316 F.2d 389 (D.C. Cir. 1963), where a union representative had expressly stated, in writing, that the conditions sought to be imposed by the employer on its disclosure of and access to financial books and records were "not unreasonable" [130 N.L.R.B. at 1271], the Board and the court upheld the employer's demand that the labor organization's representative be a "licensed public accountant or a C.P.A.".

In *Metlox Manufacturing Company and International Brotherhood of Operative Potters (AFL-CIO)*, 153 N.L.R.B. 1388 (1965), affirmed in *Metlox Manufacturing Company* v. *National Labor Relations Board*, 378 F.2d 728 (9th Cir. 1967), cert. den., 389 U.S. 1037, a labor organization, in immediate response to the employer's claimed inability to pay, sought permission to have the certified public accountant chosen by it review the employer's financial books and records. The employer and the labor organization did not agree on limitations which

the employer would have imposed on the CPA's *disclosure* of his findings to the labor organization or third persons. The Board, with Ninth Circuit approval and with certiorari denied by this Court, held that the employer violated the law by attempting to impose those limitations on the CPA's disclosure of his findings.

While there are several recognized limitations on an employer's duty to disclose and provide access to information relevant to collective bargaining, these permissible limitations arise from employer-expressed concerns for protection of trade secrets, confidentiality of employee medical records or other records. These limitations are created and protected by cases such as *Detroit Edison Company* v. *National Labor Relations Board*, 440 U.S. 301, *Plough, Inc. and Local 194, International Chemical Workers Union*, 262 N.L.R.B. 1095 (1982) and *Oil, Chemical and Atomic Workers Local No. 6-418 (AFL-CIO) et al.* v. *National Labor Relations Board et al.*, 711 F.2d 348 (D.C. Cir. 1983).

While these cases, and those of similar ilk, do permit employers to limit disclosure of and access to certain information, they have nothing whatsoever to do with either a labor organization's access right to information involving an employer's claimed inability to pay or an employer's attempt to require that the labor organization's representative possess certain credentials or meet certain criteria in order to be granted access.

II. THE INSTANT LITIGATION

A. The Board Findings

Association, as a labor organization, represented a bargaining unit of registered-professional nurses employed by Hospital since 1972. The parties entered into several collective-bargaining agreements. November 2, 1982, the parties held their first meeting to begin negotiations for a contract to succeed the contract which was due to ex-

pire December 31, 1982. The first meeting was limited to the Association's giving the Hospital a list of proposals. Ten days later, at the second meeting, the Hospital claimed inability to pay. That day, and in subsequent correspondence, the Hospital acknowledged it was obligated to provide access to certain of its financial books and records. However, it demanded that the Association prove to the Hospital's satisfaction that the representative whom the Association would choose to review the financial books and records possesses certain credentials and meets certain criteria.

December 17, 1982, Association filed an unfair-labor-practice charge against Hospital. Thereafter, the Board's Region Three director issued a complaint and a Board administrative law judge conducted a hearing on the complaint.

September 26, 1983, the administrative law judge issued her decision and recommended order, finding that Hospital's conduct amounted to an unfair labor practice.

Essentially, the relevant facts as found by the administrative law judge were:

(1) at contract negotiations, Hospital representatives claimed inability to pay and conceded Hospital's obligation to permit access to its financial books and records by an Association representative; but before Association had requested an opportunity to examine the records and before Association had mentioned to Hospital the identity of any individual whom it would choose to make the examination, Hospital demanded that the representative Association would choose be someone who met certain criteria or possessed certain qualifications;

(2) the qualifications or criteria were identified by Hospital's counsel in a letter the next day thus:

1. Must be a member of AICPA.

2. Must be a member of the New York State Society of CPA's.

3. Must be a participating CPA in New York State with the following qualifications:

   a. A minimum of five years audit experience at the management level

   b. A minimum of two of the preceding five years with management audit engagement responsibilities for voluntary community hospitals in New York State with at least 150 beds

   c. Demonstrated knowledge of the New York State Hospital Reimbursement Regulations during the period 1978-1982.

   d. Demonstrated knowledge of the Lombardi Legislation (S526-D; A7303-B) and how rates will be kept calculated

   e. References of hospital clients

(3) that letter concluded with a statement that Hospital awaited proof that the person selected by the Association meets the criteria/qualifications in the letter;

(4) by subsequent letter, Hospital's counsel informed Association "If you disagree with the reasonableness of any of those criteria, please let me know that immediately";

(5) by later communications, Hospital suggested that "any of the 'big eight' national accounting firms would be acceptable to the Hospital" [Appendix B at p. 22a];

(6) Association responded by telling Hospital's counsel that all of the criteria were unreasonable and that Association was prepared to discuss any question the Hospital might have regarding Association's CPA's analysis of the records when he completed the audit;

(7) in subsequent correspondence, Hospital modified its demand to the extent that "the CPA selected by the Association should be able to advise the Hospital of how he derived his knowledge of Medicare, Medicaid and charge control as they apply in New York State; what experience he had in analyzing financial statements in the health care industry and outline the New York State health care providers for whom he had provided professional services, the dates of the services performed and the scope of the services." [Appendix B at p. 23a];

(8) Association continued to contend that the demanded qualifications or criteria constituted unreasonable and unlawful interference and refusal to bargain in good faith;

(9) eventually, a few days before the hearing, Hospital abandoned its inability-to-pay claim and the parties negotiated a collective-bargaining agreement.

On the facts found by the administrative law judge as summarized above, she, in essence, held (1) Hospital's attempt to require that Association's representative possess certain credentials or meet certain criteria was not reasonable and it unlawfully infringed on employees' Act section 7 rights, (2) Hospital failed to demonstrate existence of a condition permitting limitation on its disclosure and access duty such as concern for protection of confidentiality or trade secrets, (3) Hospital's own expert witness' testimony disclosed that the Hospital's asserted criteria were not necessary, (4) there was no evidence that even if an individual not possessing the credentials or meeting the criteria sought by the Hospital reached "erroneous" conclusions that an error would result in either serious damage to the collective-bargaining process or a work stoppage endangering patient care, (5) Association was prepared to discuss any question the Hospital might have regarding Association's representative's

review-report and (6) there was no evidence that Association would be likely to act recklessly with the information gleaned from the review.

The Board affirmed the administrative law judge's decision modifying the recommended order in only one respect. While the recommended order had directed that the Hospital:

> Upon request, permit an examination of its financial books and records by the Union's representative,

the Board's order directed that the Hospital:

> Furnish the Union, on request and within a reasonable time, the financial information and records relevant to Respondent's claim advanced in November 1982 that it was unable to pay a wage increase.

In all other respects, the Board adopted the findings, conclusions and recommendations of the administrative law judge.

B. The Court of Appeals Proceedings

When the Board petitioned for enforcement of its order, Association, as the charging-party, intervened.

Before the Court of Appeals, the Hospital advanced the same arguments that the Board had rejected. Essentially, Hospital argued that (1) it has the right to require that the person chosen by the Association to review Hospital's books must possess certain credentials or meet certain criteria in order for Hospital to permit the person access, (2) the "qualifications" which Hospital required were "reasonable and necessary", and (3) Hospital's attempt to require the "qualifications" doesn't interfere with employees' statutory right to select bargaining representatives.

The Court of Appeals held that the Hospital had the right to require that the person chosen by the Association to review Hospital's books meet certain qualifications. Consequently, the court denied enforcement.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS DECISION APPARENTLY CONFLICTS IN PRINCIPLE WITH DECISIONS OF THIS COURT SUCH AS *TRUITT* AND *ACME* AND OF OTHER CIRCUIT COURTS AND IT ERODES THE VIABILITY OF ACT SECTION 7'S GUARANTEE THAT ANY APPROPRIATE UNIT OF EMPLOYEES IS ENTITLED TO SELECT REPRESENTATIVES OF ITS CHOICE

In *Metlox Manufacturing Company and International Brotherhood of Operative Potters (AFL-CIO)*, 153 N.L.R.B. 1388 (1965), affirmed in *Metlox Manufacturing Company* v. *National Labor Relations Board*, 378 F. 2d 728 (9th Cir. 1967), cert. den., 389 U.S. 1037, the Ninth Circuit Court of Appeals upheld a Board finding that an employer unlawfully attempted to impose limitations on the extent to which the certified public accountant chosen by the labor organization could report his or her findings to the labor organization or third parties after reviewing the employer's financial books and records.

In *Tex-Tan, Inc. and Amalgamated Meat Cutters and Butcher Workmen of North America (AFL-CIO)* 134 N.L.R.B. 253 (1961), the Board adopted the findings, conclusions and recommendations of the trial examiner who found and held, among other things [134 N.L.R.B. 253 at 272-273, footnote 33]:

> Respondent argues in its brief that the technical data involved was largely over the heads of the union representatives with whom respondent was dealing and that they were not qualified by training or experience to intelligently evaluate it. I am not convinced that this was true, at least with respect to chief negotiator Parr. But even if it were true, Respondent, in my view, would nevertheless have an obligation to attempt to explain its records to these representatives upon their request.,

and [134 N.L.R.B. 253 at 273]:

> Apparently its [Respondent employer's] only explanation for not supplying the information was that its point evaluation system was scientifically set up and that the union representatives probably would not be able to understand it. I do not regard this explanation as a valid excuse for Respondent's failure even to attempt to present and explain the system.

While the Fifth Circuit Court of Appeals denied enforcement and remanded the case in *National Labor Relations Board* v. *Tex-Tan, Inc.*, 318 F. 2d 472 (5th Cir. 1963), the Court specifically noted "We could agree with the [foregoing] conclusion . . . expressed by the Examiner . . . if that were really sustained by the record" [318 F. 2d at ——].

This Court's decisions in *National Labor Relations Board* v. *Truitt Manufacturing Company*, 351 U.S. 149, *National Labor Relations Board* v. *Acme Industrial Co.*, 385 U.S. 432, and *Detroit Edison Company* v. *National Labor Relations Board*, 440 U.S. 301, and their Board and lower court progeny do, of course, clearly establish that an employer must disclose and provide access to certain information which is concededly relevant to the collective-bargaining process. The broad principles requiring disclosure and access established by *Truitt*, *Acme*, and other decisions are improperly eroded by the Court's decision in this case. While these cases recognize the possibility of certain unusual circumstances justifying an employer to place conditions or limitations on the extent or format of the *information* to be disclosed, they do not suggest that an employer may lawfully restrict the labor organization's—and perforce, employees'—selection of the *representative* whom it would have review the concededly-relevant information. Furthermore, without regard to the question of Association's selection of its own accountant to make the review, Association submits that the Board was correct when it found that the situation did not justify Hospital's attempt to limit Association's access to the financial information.

II. THE QUESTION IS IMPORTANT BECAUSE THE COURT OF APPEALS' DECISION DENIES THE BOARD ITS DUE DEFERENCE

The Court of Appeals in this matter found that "the Board's conclusion that the hospital failed to bargain in good faith with the union is not supported by substantial evidence on the record considered as a whole" [Appendix A at p. 12a].

This Court has steadfastly required deference to interpretations and decisions of administrative agencies charged with the specific authority and responsibility of enforcing and applying particular statutes, so long as such interpretations and decisions are supported by substantial evidence and do not represent an abuse of discretion. See *National Labor Relations Board* v. *Bell Aerospace Company Division of Textron, Inc.*, 416 U.S. 267; *National Labor Relations Board* v. *Action Automotive, Inc.*, 469 U.S. ——, and *Chemical Manufacturers Association et al.* v. *National Resources Defense Council, Inc.* and *United States Environmental Protection Agency* v. *National Resources Defense Council, Inc.*, 470 U.S. ——.

Association respectfully submits that the Court of Appeals in this matter has inappropriately substituted its judgment for that of the Board.

III. THE QUESTION IS IMPORTANT BECAUSE THE COURT OF APPEALS' DECISION EFFECTIVELY CREATES A WIDE-RANGING OPPORTUNITY FOR EMPLOYERS IN ANY INDUSTRY—NOT MERELY HEALTH CARE—TO FRUSTRATE AND DELAY THE COLLECTIVE BARGAINING PROCESS

Various Act provisions reflect Congress' intent that labor strife be avoided.

In this sense, this matter is similar to the decisions involving insistence to impasse by parties to prospective negotiating sessions that such sessions be tape-recorded or stenographically-recorded. The decisions hold that such

insistence is impermissible because it undermines the policy of the Act to allow breakdown of negotiations over such a threshold procedural issue. See *National Labor Relations Board* v. *Bartlett-Collins Company*, 639 F. 2d 652 (10th Cir. 1981), cert. den., 452 U.S. 961 and *Latrobe Steel Company* v. *National Labor Relations Board*, 630 F. 2d 171 (3rd Cir. 1980), cert. den., 454 U.S. 821.

In order to ensure that patients not suffer disruption in care due to labor strife, Congress created special prestrike notice requirements which effectively grant health care employees ample opportunity to protect their patients from potentially-harmful discontinuance in care due to work stoppages. While the Court of Appeals takes great pains to point out Congress' special concern that employees' organizational activities not be allowed to disrupt the continuity of patient care [Appendix A at p. 10a], the Court of Appeals ignores the existence of the protective devices created by Congress, such as Act section 8(g) to safeguard against such disruption. The Court also ignores the fact that Congress did *not* modify Act section 8(d)'s bargaining requirements for health care employers and Congress did *not* modify Act section 8(a)(5) for health care employers. Therefore, as the Court of Appeals does not limit its decision to application in the health-care industry, by permitting any employer to require a labor organization to bargain over the credentials of a labor organization's representative chosen to review presumptively and concededly relevant information, the Court of Appeals encourages dilatory tactics. Association submits that to the extent valuable negotiating time is spent on the "reasonableness" of credentials to be required of representatives, rather than on substantive issues of employment terms and conditions, represented employees will feel compelled to force the "real" issues by engaging in strikes, slow-downs or other statutorily-discouraged self-help.

In this vein, the Court of Appeals noted that "The union did not assert, nor do we find, that the hospital raised

this concern in bad faith or for some disingenuous reason" [Appendix A at p. 9a]. It is nonetheless interesting to note, as the Board administrative law judge and the Court of Appeals did, that the Hospital eventually abandoned its inability-to-pay claim a few days before the scheduled date of the hearing before the administrative law judge and it attempted, unsuccessfully, to persuade the administrative law judge that the matter was thereby rendered moot.

IV. THE QUESTION IS IMPORTANT BECAUSE THE COURT OF APPEALS DECISION MAKES AN INAPPROPRIATE DISTINCTION BETWEEN EMPLOYEES' REPRESENTATIVES CHOSEN FOR "COLLECTIVE BARGAINING" PURPOSES AND THOSE CHOSEN FOR OTHER PURPOSES

It seems clear that in a proceeding in which the Federal Rules of Civil Procedure apply, a party who possesses or controls documents, real property or personal property, may not avoid disclosure or access to admittedly-relevant documents or property by claiming that the representative chosen by the other party to review or examine such documents or property under Rule 34 is somehow lacking in certain credentials asserted as necessary by the objecting party.

Nonetheless, the Court of Appeals in the instant matter noted and held:

> Citing *Oates Brothers, Inc.*, 135 NLRB 1295, 1297 (1962), the Administrative Law Judge also noted in her decision that "[i]t is well established that in the absence of special circumstances, an employer does not have the choice either affirmative or negative as to who is to represent employees for any of the purposes of collective bargaining", and suggested that the hospital thus impermissibly interfered with the union's selection of its bargaining representative. It does not appear, however, that the auditor in these circumstances was intended to function as the union's

> bargaining representative as distinguished from a source of information.
>
> [Appendix A at p. 12a.]

Implicit in the Court's holding is an equation of "collective bargaining" to "negotiating". If the right to "bargain collectively through representatives" were limited to the right to "negotiate", but, without the concomitant right to obtain information relevant to employment terms and conditions, Act section 8(a)(5) would be of little value indeed to employees. The Act, after all, at section 2(4), provides:

> The term "representatives" includes any individual or labor organization.

If the distinction by the Court of Appeals is warranted, what would have been the result had the Association been denied permission to send in its chief negotiator to review the books and records? Or, alternatively, what would have been the result had the Association chosen its certified public accountant to be a negotiator?

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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June 4, 1985

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 303—August Term 1984

(Argued: October 25, 1984 Decided: February 14, 1985)

Docket No. 84-4085

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

—against—

ST. JOSEPH'S HOSPITAL,
Respondent.

Before:

FRIENDLY, PIERCE, and PRATT, *Circuit Judges.*

Petition to enforce an order of the National Labor Relations Board. Enforcement denied.

DEBORAH M. P. YAFFE, Washington, DC (Wilford W. Johansen, Acting General Counsel; John E. Higgins, Jr., Deputy General Counsel; Robert E. Allen, Associate General Counsel; Elliott Moore, Deputy Associate General Counsel; John G. Elligers, National Labor Relations Board, Washington, DC, of Counsel), *for Petitioner.*

SUSAN S. ROBFOGEL, Rochester, NY (Mary J. Harrington, Harris, Beach, Wilcox, Rubin & Levey, Rochester, NY, of Counsel), *for Respondent.*

JEFFREY DANA GILLEN, Albany, NY (Harder, Silber & Gillen, Albany, NY, of Counsel), *for Intervenor, New York State Nurses Association.*

PRATT, *Circuit Judge:*

The issue before us is whether an employer committed an unfair labor practice by establishing certain qualifications for the union's auditor who was to examine the employer's financial records to verify its claimed inability to pay a wage increase when 1) the qualifications were apparently reasonably related to the problem of the audit, 2) the employer indicated its willingness to discuss the qualifications, and 3) the union refused to negotiate the qualifications and raised no specific objection to any of them.

For the reasons below, we conclude that the employer did not engage in an unfair labor practice, and deny enforcement of the NLRB order.

BACKGROUND

There is no dispute over the facts. St. Joseph's is a voluntary not-for-profit hospital located in Elmira, New York. Under the New York State reimbursement system and cost containment regulations for hospitals, 100% of its income is controlled by the state.

As the representative since 1972 for approximately 200 of St. Joseph's nurses, the New York State Nurses Association (the "union") had entered into several collective bargaining agreements with the hospital. With an agreement due to expire on December 31, 1982, the parties commenced negotiations for a successor agreement on November 2, 1982. During the second negotiating session,

on November 12, the hospital asserted that new revenue caps imposed by New York State on its reimbursement funds, combined with other financial developments, had rendered the hospital unable to offer registered nurses any pay increase. The hospital offered, however, to permit a "mutually acceptable qualified CPA" to review its financial records to verify the claim.

The following day the hospital sent a letter to the union confirming its willingness to allow an auditor who was a certified public accountant (CPA) to review the financial records, but elaborated that

> [t]he following criteria must be met for the selected CPA to be acceptable to the hospital:
>
> 1. Must be a member of AICPA.
> 2. Must be a member of the New York State Society of CPA's.
> 3. Must be a participating CPA in New York State with the following qualifications:
>
> a. A minimum of five years audit experience at management level
>
> b. A minimum of two of the preceding five years with management audit engagement responsibilities for voluntary community hospitals in New York State with at least 150 beds.
>
> c. Demonstrated knowledge of the New York State Hospital Reimbursement Regulations during the period 1978-1982
>
> d. Demonstrated knowledge of the Lombardi legislation (S526-D; A7303-B) and how rates will be kept calculated
>
> e. References of hospital clients

The hospital stressed that it was "imperative that the CPA retained to perform this function for [the union]

have demonstrated knowledge of the New York State Reimbursement System."

Without acknowledging the hospital's letter, the union on November 17 requested that the hospital either send certain financial records and information to an auditor designated by the union, William Odendahl, or have it available for his review on December 10th. Although the union letter indicated that Odendahl was a CPA, it did not suggest that he met any of the additional criteria proposed by the hospital, or that he had any other relevant qualifications.

In its November 24 response the hospital stated that its records would be available for review on or before December 10, but reiterated that it would expect to receive "proof that Mr. Odendahl [met] the criteria spelled out in [the November 13] letter prior to his arrival", and requested immediate notification if the union disagreed with the reasonableness of any of the criteria.

One week later the union cancelled the bargaining session scheduled for December 8 and 9 "[i]n the absence of an auditor's report." Without responding to the hospital's concerns or attempting to document Odendahl's qualifications, the union asserted that he was "eminently qualified and fully authorized to act" as the union's agent. The union took the position that any questions about his analysis of pertinent data could be discussed upon completion of his work.

Still seeking evidence of Odendahl's qualifications, the hospital requested the information on December 6th, first by phone and then by confirming mailgram. The hospital stressed that it remained willing to discuss any of the criteria the union found unreasonable and, in an effort to be "helpful", suggested that "any of the 'Big Eight' national accounting firms would be acceptable."

In the absence of any response by the union, the hospital sent another letter on December 17, urging the union

to schedule some bargaining sessions in view of the pending expiration of the existing agreement. On that same day the union filed an unfair labor practice charge with the National Labor Relations Board. Three weeks later the NLRB issued a complaint against the hospital alleging that the hospital had refused to bargain collectively with the union in violation of §§ 8(a)(1) and (5) of the National Labor Relations Act, by placing unreasonable restrictions on access to information sought by the union.

At a third meeting between the parties on January 17, the hospital expressed its concern that an accountant unfamiliar with the complicated methodologies of the New York State reimbursement system might deliver a misleading report which could tend to produce "serious employee relations problems because of misunderstandings." Nevertheless, the union refused to discuss the criteria, asserted that all of the hospital's criteria were unreasonable, and insisted that it had the right to send in "anyone" it chose.

On January 28 the hospital reiterated that it was "willing and anxious to discuss or negotiate" any of the specific criteria that were unacceptable to the union. A month and a half later the union responded, but merely asserted, and still without factual support, that Odendahl had "demonstrated professional experience and competence in auditing the financial records of a not-for-profit voluntary hospital". It did not identify the hospital. The union reasserted that whatever the outcome of this audit, the hospital would be able to challenge Odendahl's findings after they were completed.

With the hope of clarifying the criteria set forth in the November 13th letter, the hospital proposed on April 21 that

> [t]o satisfy the Hospital's legitimate demand that the CPA selected be someone with demonstrated expertise in New York State reimbursement, he should be able to advise the Hospital of

> (1) how he derived his knowledge of Medicare, Medicaid and charge control as they apply in New York State; (2) what his experience is in analyzing financial statements in the health care industry; and (3) The New York State health care providers for whom he has provided professional services, the dates of the services performed, and the scope of the services.

The hospital added that it was asking only that the CPA be someone who could understand the financial problems created by the state reimbursement mechanisms and stated that "[a]ny criteria set forth in [the November 13 letter] that could be construed as making additional demands may be disregarded." The union did not respond.

Despite the apparent standoff on who should audit the records, the parties continued to negotiate the underlying wage issues. Then, in early May 1983, the hospital informed the union that its economic situation appeared to be changing and that it would be able to offer a prospective wage increase. Despite this change in conditions that eliminated the need for a union auditor, Administrative Law Judge Winifred D. Morio held a hearing on the union's charges on May 26, 1983.

In July 1983, after the hearing was concluded, the parties entered into a new collective bargaining agreement. Nevertheless, Judge Morio issued a Decision and Recommended Order in September 1983 in which she found that the hospital had refused to bargain in good faith with the union and ordered the hospital to permit the union's representative to examine its financial records.

Upon review by the NLRB, the hospital claimed that since the parties had reached agreement, the entire issue was moot and the information sought by the union was no longer relevant for bargaining. In response, the union argued that the order should be affirmed since the union

would have the same problem when negotiations commenced for a new collective bargaining agreement.

The board affirmed the ALJ's findings and conclusions of law and issued an order requiring the hospital to cease and desist from refusing to bargain in good faith, and to furnish the union with financial records and information relevant to the claimed inability to pay a wage increase. The board then petitioned this court for enforcement of its order.

Discussion

In determining whether the hospital's actions constitute a failure to bargain in good faith, the scope of our review is somewhat limited. Although findings of the board with respect to questions of fact shall be conclusive if supported by substantial evidence on the record as a whole, 29 U.S.C. § 160(e), what constitutes a failure to bargain in good faith is a question of mixed law and fact, *NLRB* v. *Tomco Communications, Inc.*, 567 F.2d 871, 876 n.2 (9th Cir. 1978). "Where the issues are not purely factual, the Act does not explicitly direct the courts to exercise a particular measure of review. Manifestly, however, the measure of our oversight increases as the Board's determination approaches the purely legal." *Id.* Nevertheless, determining whether a party's conduct evidences a lack of good faith is an elusive inquiry, and the court should not lightly disregard the overall appraisal of the situation by the NLRB as the agency presumably equipped to deal with the specialized field of labor relations. *NLRB* v. *F. Strauss & Son, Inc.*, 536 F.2d 60, 65 (5th Cir. 1976).

An employer's "refusal to attempt to substantiate a claim of inability to pay increased wages may support a finding of a failure to bargain in good faith" with the representative of his employees, *NLRB* v. *Truitt Manufacturing Co.*, 351 U.S. 149, 153 (1956), and thereby constitute an unfair labor practice under the National Labor

Relations Act. 29 U.S.C. § 158(a)(5). Nevertheless, the Supreme Court has expressly declined to adopt a rule that "union interests in arguably relevant information must always predominate over all other interests, however, [sic] legitimate." *Detroit Edison Co.* v. *NLRB*, 440 U.S. 301, 318 (1979). The union is not automatically entitled to substantiating information in the exact manner requested in every case where the employer claims an inability to pay a wage increase. "Each case must turn upon its particular facts. The inquiry must always be whether or not under the circumstances of the particular case the statutory obligation to bargain in good faith has been met." *Truitt Manufacturing Co.*, 351 U.S. at 153-54 (footnote omitted).

Neither the courts nor the NLRB has ever "ruled that an employer is under an obligation 'to bare his books' to a union, or to any other employee representative." *Yakima Frozen Foods*, 130 NLRB 1269, 1273 n.5 (1961), *enforced in part sub nom. Fruit & Vegetable Packers & Warehousemen Local 760* v. *NLRB*, 316 F.2d 389 (D.C. Cir. 1963). Where unions have sought information concededly relevant to the collective bargaining process, courts have found that there are "situations in which an employer's conditional offer to disclose may be warranted." *Detroit Edison Co.*, 440 U.S. at 318 (confidentiality of employee aptitude test results warrants restrictions on disclosure); *see also Oil, Chemical & Atomic Workers Local Union* v. *NLRB*, 711 F.2d 348, 362-63 (D.C. Cir. 1983) (trade secrets and confidentiality of medical records may warrant restrictions on disclosure). In evaluating a requested condition, the important question is whether the employer has asserted a "legitimate and substantial" justification for limiting the disclosure. *See Detroit Edison*, 440 U.S. at 315-20; *Plough, Inc.*, 262 NLRB 1095, 1096 (1982).

For example, in *Yakima Frozen Foods*, 130 NLRB at 1269, the union sought access to the company's records

to verify a claimed inability to pay a wage increase. The employer refused to allow members or employees of the union access to its records, and instead insisted that the records be audited by a licensed CPA not in the union's general employ. The company was afraid to let the union know its sources of supplies and consignees for fear of secondary boycotts, but believed that a licensed public accountant would not disclose such confidential information. *Id.* at 1271 n.2. The NLRB held that the employer's offer was a reasonable one and that the conditions "imposed on the audit cannot be said to have been unduly burdensome or unduly restrictive on the Union." *Id.* at 1273. On review, the D.C. circuit noted that "[c]learly there may be circumstances under which a businessman is justified in circumscribing the manner in which he makes his records available for inspection." *Fruit & Vegetable Packers & Warehousemen Local 760*, 316 F.2d at 391.

Those justifying circumstances are also present in the case before us. From the moment the hospital asserted its inability to pay a wage increase, it acknowledged its obligation to give the union the opportunity to verify that claim. The sole condition established by the hospital, that the union select an accountant having certain qualifications, was established to ensure that the accountant had the expertise to accurately forecast the hospital's income over the coming year. The hospital explained that it feared labor strife if an unqualified accountant erroneously should report that the hospital could pay a wage increase. The union did not assert, nor do we find, that the hospital raised this concern in bad faith or for some disingenuous reason. Indeed, "[t]he legislative history of the 1974 amendments to the Taft-Hartley Act extending its coverage to nonprofit health care facilities clearly demonstrates the overriding congressional concern that the self-organizational activities of health care employees not be allowed to 'disrupt the continuity of patient care.'" *St. John's Hospital and School of Nursing* v. *NLRB*, 557 F.2d 1368, 1374 (10th Cir. 1977).

Under the circumstances, the hospital's concern over the unnecessary harm that could be precipitated by an unqualified auditor was legitimate and reasonable. The ALJ found that the hospital's concerns were not legitimate, apparently because the record failed to establish that the union would strike if the audit mistakenly concluded that the hospital could afford a wage increase. Actual proof that a strike was likely was not necessary, however, to conclude that the hospital's fear that a mistaken audit might adversely affect the bargaining process was reasonable, particularly in light of Congress's especial concern that union activities in hospitals not disrupt patient care. *See* S. Rep. No. 93-766, 93d Cong., 2d Sess. 7 (1974), *reprinted in* 1974 U.S. Code Cong. & Ad. News 3946, 3951. We can take notice that accountants, like lawyers, are no longer fungible. A CPA entirely qualified to interpret the records of ordinary business corporations may not have had the experience necessary to reach a sound forecast of the revenues and expenses of voluntary hospitals, dependent, as they generally are, on government financing.

Significantly, the hospital repeatedly offered to meet with the union to discuss any requirements that the union felt were unreasonable. It even modified the criteria on one occasion in an attempt to provide the union with an acceptable proposal, and on another occasion indicated that the selection of any of the "Big Eight" accounting firms, which include an adequate array of specialists, would suffice.

In contrast, the union ignored the hospital's offer to discuss the criteria and simply stated that the criteria were all unreasonable—without advancing a single specific objection. The union's chief negotiator later admitted that he had no idea what type of qualifications would be necessary to evaluate the hospital's claimed inability to pay a wage increase. Under the circumstances the union's failure to cooperate with the employer to develop acceptable criteria was unjustified.

Such "stonewalling" by a union should not be rewarded through enforcement action against the hospital. "When the employer presents a legitimate, good faith objection * * * [to providing access to information], and offers to cooperate with the union in reaching a mutually acceptable accommodation, it is incumbent on the union to reach some type of compromise with the employer * * *." *Soule Glass & Glazing Co.* v. *NLRB*, 652 F.2d 1055, 1098 (1st Cir. 1981).

The union's almost immediate resort to the board was premature. *See id.* at 1098 (*quoting Emeryville Research Center, Shell Development Co.* v. *NLRB*, 441 F.2d 880, 886) (9th Cir. 1971). In situations such as this the board should first give the parties an opportunity, through collective bargaining, to reach some mutually satisfactory agreement over the appropriate qualifications for the CPA. *See Plough, Inc.*, 262 NLRB at 1096.

We recognize that in some circumstances the parties, after reasonable attempts at negotiation, may be unable to reach agreement over appropriate qualifications. In such a case the board, of course, may determine whether an unfair labor practice has been committed. *See id.*, at 1096. However, under the circumstances of this case, where the hospital's concern over qualifications of the auditor were legitimate and substantial, and where the union rejected all attempts at discussion of the point, made an unsupported categorical objection that all suggested criteria were unreasonable, and insisted that it could appoint anyone it chose to audit the hospital's records, there was insufficient evidence to support the board's conclusion that the hospital had failed to bargain in good faith.

Faced with similar facts, the ninth circuit noted that "[p]resentation of *bona fide* concerns by the Company, coupled with reasonable proposals designed to satisfy the needs of the Union and to achieve a mutually satisfactory resolution of the Union request, is simply not a re-

sal to bargain. On the contrary this is precisely the nduct the Labor Act is designed to foster." *Shell Oil* . v. *NLRB*, 457 F.2d 615, 620 (9th Cir. 1972) (em- oyer had stated specific objection to furnishing informa- n in the form requested and offered to discuss the re- est in light of the union's needs and the employer's terests, but the union refused to discuss the matter and nt directly to the board). *Accord Emeryville Research nter, Shell Development Co.*, at 883-84.

Citing *Oates Brothers, Inc.*, 135 NLRB 1295, 1297 962), the Administrative Law Judge also noted in her cision that "[i]t is well established that in the absence special circumstances, an employer does not have the oice either affirmative or negative as to who is to rep- sent employees for any of the purposes of collective rgaining", and suggested that the hospital thus imper- ssibly interfered with the union's selection of its bar- ining representative. It does not appear, however, that e auditor in these circumstances was intended to func- n as the union's bargaining representative as distin- ished from a source of information.

Thus, the board's conclusion that the hospital failed to rgain in good faith with the union is not supported by bstantial evidence on the record considered as a whole. ather, "[o]n this record it would be unreasonable to nclude that the [hospital] was not voicing good faith ncern, or that its proposals were not reasonable and rious." *Shell Oil Co.*, 457 F.2d at 620.

Enforcement denied.

APPENDIX B

ZHDe

D—1601
Elmira, NY

269 NLRB No. 147

UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 3—CA—11364

ST. JOSEPH'S HOSPITAL

and

NEW YORK STATE NURSES ASSOCIATION

DECISION AND ORDER

On 26 September 1983 Administrative Law Judge Winifred D. Morio issued the attached decision. The Respondent filed exceptions and a supporting brief, and both the General Counsel and the Charging Party filed answering briefs.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

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[1] We deny the Respondent's motion to reopen the record. The execution of a collective-bargaining agreement between the parties does not moot the need to remedy an unlawful refusal to produce information during negotiations for an agreement. E.g., *Latimer Bros.*, 242 NLRB 50, 52-53 (1979). We will, however, modify the recommended Order and notice language to specify that the Union have access only to information requested during negotiations.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, St. Joseph's Hospital, Elmira, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

"(a) Furnish the Union, on request and within a reasonable time, the financial information and records relevant to Respondent's claim advanced in November 1982 that it was unable to pay a wage increase."

2. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C., 4 April 1984

DON A. ZIMMERMAN, Member

ROBERT P. HUNTER, Member

PATRICIA DIAZ DENNIS, Member

NATIONAL LABOR RELATIONS BOARD

[SEAL]

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain in good faith with New York State Nurses Association (the Union) by denying the Union's request for an examination of our financial books and records by a representative designated by the Union to investigate our claim of an inability to pay a wage increase.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL furnish the Union, on request and within a reasonable time, the financial information and records relevant to our claim advanced in November 1982 that we were unable to pay a wage increase.

ST. JOSEPH'S HOSPITAL

_____

(Employer)

Dated _____ By _____

(Representative (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Building, Room 901, 111 West Huron Street, Buffalo, New York 14202, Telephone 716—846-4951.

JD-(NY)-104-83
Elmira, NY

UNITED STATES OF AMERICA BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
BRANCH OFFICE
NEW YORK, NEW YORK

Case No. 3-CA-11364

ST. JOSEPH'S HOSPITAL

and

NEW YORK STATE NURSES ASSOCIATION

Robert A. Ellison, Esq., for the General Counsel, Albany, New York.

Susan S. Robfogel, Esq. (*Harris, Beach, Wilcox, Rubin and Levey*) for the Respondent, Rochester, New York.

Jeffrey Dana Gillen, Esq. (*Harder, Silber & Gillen*) for the Charging Party, Albany, New York.

DECISION

Statement of the Case

WINIFRED D. MORIO, Administrative Law Judge: This case was tried before me on May 26, 1983 in Elmira, New York pursuant to a Complaint issued by the Regional Director, Region 3 on January 17, 1983. The

Complaint, based on a charge filed by New York State Nurses Association (Association/Union) against St. Joseph's Hospital (Respondent/Hospital) alleges, in substance, that Respondent violated Section 8(a)(1) and (5) of the Act by refusing to permit an examination of its financial records although it claimed an inability to pay a wage increase. The Answer, basically, denies the commission of the alleged unfair labor practices.

All parties were given a full opportunity to participate in the proceedings, to cross-examine witnesses, to argue orally and to file briefs. Briefs were filed by all parties.

Upon the entire record in the case and my observation of the demeanor of the witnesses and after careful consideration, I make the following:

Findings of Facts

I. Jurisdiction

St. Joseph's Hospital (Respondent/Hospital), a New York corporation with its principal office and place of business in Elmira, New York, is engaged in the business of providing health care services on an in-patient and outpatient basis. During the past year, a representative period, Respondent, in the course and conduct of its business operations, received gross revenues in excess of $250,000 and during the same period of time purchased and received goods and materials valued in excess of $10,000, which goods and materials were shipped directly to Respondent from points located outside the State of New York. The parties admit, and I find, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and a health care institution within the meaning of Section 2(14) of the Act.

II. The Labor Organization

The parties admit, and I find, that New York State Nurses Association (Association) is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

The Union has been the collective-bargaining representative for the registered nurses at the Hospital since 1972. During the years the parties have executed a series of collective-bargaining agreements, the most recent one, at the time of the events in this case, was effective from January 1, 1982 to December 31, 1982. On November 2, 1982 the parties met to begin negotiations for a new contract. The Union's chief representative was Bart Minsky and the Hospital's chief representative was Susan S. Robfogel.[1] The Union presented its proposals and the parties agreed to meet on November 12, 1982. The second meeting was held as scheduled with Minsky and Robfogel continuing in their roles as chief representative for their respective party. During this meeting, the Administrator for the Hospital, Sister Martha Gersbach announced that the Hospital faced a serious financial problem due to the insufficient reimbursement funds received from New York State. She then outlined a ten point cost reduction program which was to be implemented in 1983. Sister Martha also stated that the Hospital would review its financial situation on a monthly basis and would grant pay increases when it was possible to do so.[2] Minsky questioned Robfogel as to whether the Hospital was claiming an inability to pay and Robfogel replied that that was the situation. Robfogel also stated that since the Hospital was claiming an inability to pay, it realized it

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[1] Ms. Robfogel is counsel to the Hospital.

[2] The Administrator was not part of the Hospital's negotiating team.

had to permit the Association to examine its financial records. Kenneth Emery, the Hospital's Director of Human Resources, testified that Robfogel stated that the Hospital would permit a mutually agreeable qualified public accountant to check its records to verify the Respondent's financial condition. According to Emery, the Hospital's representatives explained that the individual selected by the Association should be someone who had a working knowledge of and experience with the New York State reimbursement system and "who would be knowledgeable about the new law as well as the old law regarding the reimbursement system." At this point the Association's representatives had not indicated that they would seek to examine the Hospital's records nor had they proposed any individual to conduct an examination. Emery testified that the Hospital did not question the right of the Association to examine its records, that was not the issue. The Hospital's only concern, according to Emery, was that the individual selected by the Association "be mutually agreeable and qualified" and it was the individual's qualifications that was of paramount importance.

On November 13, 1982 Robfogel wrote to Minsky outlining the criteria the Hospital considered necessary for any CPA selected by the Association to have before the Hospital would permit an examination of its records. The criteria set forth in the letter were as follows:

1. Must be a member of AICPA.

2. Must be a member of the New York State Society of CPA's.

3. Must be a participating CPA in New York State with the following qualifications:

   (a) A minimum of five years audit experience at the management level.

(b) A minimum of two of the preceding five years with management audit engagement responsibilities for voluntary community hospitals in New York State with at least 150 beds.

(c) Demonstrated knowledge of the New York State Hospital Reimbursement Regulations during the period 1978-1982.

(d) Demonstrated knowledge of the Lombardi Legislation (S526-D; A7303-B) and how rates will be calculated.

(e) References of hospital clients.

Robfogel concluded the letter with the statement that she awaited proof that the CPA selected by the Association met the criteria outlined above. On November 17, 1982 Minsky wrote to Emery requesting specific records and setting December 10, 1982 as the date the material should be available for an examination by the Association's representative, William J. Odendahl, Jr., a certified public accountant. The records requested were the following: [3]

1. A copy of the annual audit report for the three most recent years, including:

(a) Statement of Earnings for the years ended;

(b) Statement of Financial Position (Balance Sheet) as of the year ends;

(c) Statement of Equity for years ended;

(d) Statement of Fund Flows (Cash Flows) for years ended;

(e) Notes to financial statements and auditors' opinion letter.

---

[3] The records considered necessary were based on Odendahl's suggestions.

2. Copies of internal financial operations, including all statements listed as items 1 (a), (b), (c), (d) and (e) for the current period to date and projected for the full year and at the year end.

3. Reimbursement Rates from all third party payers for the previous three years and the current year.

4. Bed census on a monthly basis for the previous three years and the current year.

5. Copies of the Institution Cost Reports and Statistical Reports filed with New York State for the three most recent years.

6. Copies of tax returns filed for the three most recent years.

7. Copies of Annual Charities Report for the three most recent years.

Robfogel, on November 24, 1982, forwarded another letter to Minsky wherein she stated that the suggested date for the examination of the records was agreeable, although if an earlier date was possible that would be preferable. The letter also stated the following:

> In accord with my letter to you of November 13, 1982 the Hospital will expect to receive proof that Mr. Odendahl meets the criteria spelled out in that letter prior to his arrival at the Hospital. If you disagree with the reasonableness of any of those criteria, please let me know that immediately.

Minsky, on December 1, 1982, advised Robfogel that in absence of Odendahl's report the Association was cancelling the bargaining sessions which had been set for December 9 and 10, 1982. In addition, Minsky informed Robfogel that the Association considered Odendahl "eminently qualified and fully authorized to act as the Association's representative." Minsky also advised Robfogel that the Association was prepared to discuss any question

the Hospital representatives might have regarding Odendahl's analysis of the records when Odendahl completed his audit. On December 6, 1982 Robfogel sent a mailgram to Minsky reiterating the Hospital's position that the CPA selected by the Association meet the previously outlined criteria and stating that the Hospital would be willing to discuss any of the criteria the Association considered unreasonable. The mailgram also contained the following statement, "If it would be helpful to you, any of the "big eight" national accounting firms would be acceptable to the hospital." On December 17, 1982 Robfogel wrote to Minsky urging him to contact her concerning the scheduling of new bargaining sessions. Thereafter, the parties met on January 17, 1983 and Minsky informed Robfogel that it was the Association's right to choose its representative and he stated that he rejected all the criteria set by the Hospital on the ground that they were unreasonable.

Emery testified that during this meeting on January 17, 1983 Robfogel expressed her concern that if the Association utilized someone to examine the records who was unfamiliar with the state's reimbursement system, a report could issue, which did not represent the Hospital's true financial picture and this could cause problems with the employees in the bargaining unit. Minsky testified that at this meeting Robfogel also stated that an inaccurate report could set off a volatile situation.

In January 1983 Minsky terminated his employment with the Association. On January 28, 1983 Robfogel forwarded a letter to Richard J. Silber, counsel for the Association, in which she set forth the background facts and again stated that the Hospital did not question the Association's right to examine the Hospital's records but insisted, "that the independent CPA be someone with demonstrated knowledge of the New York State hospital reimbursement mechanism and in particular the new Medicare Waiver." Robfogel explained that the Hos-

pital's inability to pay was "inextricably" tied to and a direct result of the New York State reimbursement system and the new Medicare Waiver and it was, therefore, necessary to have someone with knowledge in the area. She expressed her willingness to discuss any of the criteria set forth in her earlier letter.

On March 18, 1983 Sibers replied that the Association considered that Odendahl possessed the necessary experience and competence to audit hospital records and that if the Hospital disagreed with his findings they could challenge them. Robfogel replied on April 21, 1983, that the CPA selected by the Association should be able to advise the Hospital of how he derived his knowledge of Medicare, Medicaid and charge control as they apply in New York State; what experience he had in analyzing financial statements in the health care industry and outline the New York State health care providers for whom he had provided professional services, the dates of the services performed and the scope of the services. Robfogel also stated that all other criteria set forth in her letter of November 13, 1982 should be ignored.

Respondent witnesses testified that New York State, by virtue of its reimbursement system and certain regulations and legislation, exerts extensive control over the Hospital's revenue. Due to this control Respondent contends that a proper assessment of its financial records can only be made by a CPA with a demonstrated knowledge in the area of the New York State reimbursement system. In support of its position Respondent called as an expert witness, Gerald J. Rotenberg.

Rotenberg, a certified public accountant, testified that his firm, consisting of about 24 to 25 professional employees, provides broad-based accounting services for its clients. The firm includes among its clients, approximately 22 health care institutions, 20 of these institutions are located in New York State. It was Rotenberg's opinion that auditors who examine records in order to verify

an employer's claim of an inability to pay investigate the situation in two stages. The first stage involves an examination to ascertain whether the records of the employer were proper and accurate; whether they were kept in accordance with sound accounting principles and whether the requisite submissions made to various government agencies were correct. Rotenberg testified that any certified public accountant would be competent to perform this type of examination. However, when an auditor seeks to verify an employer's claim of inability to pay, Rotenberg stated that "a single day's snapshot of the financial condition of the company does not give you what you are looking for." It is the next level of investigation that is the crucial one. At this level, according to Rotenberg, the auditor seeks to evaluate the employer's future operations and "the rules and regulations that govern us as an auditor, no longer govern us as analysts of future data." Rotenberg stated that in order to analyze records of an employer to determine the prospective picture, a CPA must have practical experience in the field. This is particularly true, he claimed, when the records being examined are those of an industry subject to government regulations, such as public utility companies, the insurance companies and institutions in the health care field.

In the health care field government regulations control the reimbursement procedure. In New York State, contrary to the prior federal system of reimbursement and the system that exists in many states, the reimbursement system is based on the concept of prospective reimbursement rather than retroactive reimbursement. In the prospective reimbursement system the state predetermines the rate the health care institution will receive.[4] Rates are based by the State on the costs incurred by the insti-

[4] In the retroactive reimbursement system the health care provider submits its actual costs for reimbursement and the federal or state government will pay the actual costs.

tution in prior years and then are adjusted by a trend factor to allow for inflation.[5] The Hospital's costs are divided into various categories and each category can be affected by a different trend factor. Rotenberg claimed that an auditor, in order to evaluate the Hospital's projections, must be knowledgeable about the trend factors and be able to anticipate how those factors can change. In addition, the rates set by the State usually are appealed by the health care provider and an in depth knowledge of this appeal process is necessary if the appeal is to be successful.

In Rotenberg's opinion, in order for a CPA to adequately understand the complexities of the reimbursement system in the health care field, the CPA should be knowledgeable about statistics and economics, the New York State Health Department Code (part 86), the Medicare Manual relating to cost reimbursement, the New York State Health Department regulations and memoranda, the Social Services' regulations and memoranda, the Blue Cross/Blue Shield reimbursement system, the Charge Control System in the State of New York, and the 1983 Medicare Waiver. Rotenberg was doubtful that a CPA, unfamiliar with the health care field, could gain the requisite knowledge from reading the laws and regulations in the particular areas set forth above. In his opinion, knowledge could be gained only from working with the system, he was unaware of courses offered by schools on this subject matter. He also stated that a CPA who had worked for a governmental agency in the health care field or for one of the major accounting firms with basic operations in New York might have the necessary expertise.

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[5] Roger Burns, the Hospital's Director of Fiscal Services, testified that the initial rates set for Medicaid and Medicare came out in November 1982. However, the final rates for Medicaid were set in either December 1982 or January 1983 while the final rate for Medicare was not available until March 27, 1983.

On cross-examination Rotenberg testified that all CPA's re eligible for membership in the American Institute f Certified Public Accountants (AICPA) and any CPA ertified by the State of New York could join the New ork Society of CPA's. He did not consider manageent auditing experience as a necessary criteria for an uditor to have in order to verify an employer's claim f an inability to pay. While he personally could not onceive of anyone being able to comprehend the reimursement system through research and reading only, e would not say that it could not be done. Rotenberg tated that an individual could demonstrate his knowldge of the reimbursement system by identifying the lients he worked with, the type of work he performed, esponding to independent questioning as to his knowldge of the system or by reference to third party sources, uch as other accountants, attorneys or health departent officials. However, he admitted that under the rofessional standards of AICPA, a CPA should not reeal the name of the client for whom he has performed ervices without the client's permission. He stated that e was unaware if there was a prohibition on revealing o third parties the nature of the services an auditor erformed for a client, but he considered it "highly unthical" to do so unless the service related to a normal ccounting or auditing function. He recognized that nder the AICPA code a CPA should not undertake an ssignment unless he was of the opinion that he could ompetently perform the work. Rotenberg further testied that AICPA does not recognize any field of pecialties.

Rotenberg stated that until some weeks prior to the earing the Hospital had not requested his opinion about he criteria necessary for a CPA to properly perform an xamination of the records of an employer in the health are field who claimed an inability to pay. He was unware of how the Hospital's representatives determined

ne criteria they required the Association's auditors to ave before they would permit an examination of their nancial records. He stated that the request set forth n the April 23 letter was more complex than necessary, lthough he thought the request was a reasonable one. lowever, he also testified that an in-depth examination nder points two and three of that letter would be em- arrassing, if not impossible.

Rotenberg admitted that a competent CPA would be ble to determine if there was, in fact an inability to ay, if he had the information given by the state to the mployer and additional information given by the em- loyer to the accountant. However, while admitting that act Rotenberg stressed that this would be true only if ne rate set by the state was accepted by the employer s the correct rate and this rarely occurred. Employers sually appeal the rate set by the state and the CPA ould need to be familiar with the appeal process to etermine whether the appeal would be successful. Fur- ner, in those situations where the rate had not been et by the state, the CPA would be unable to make any mputations because the starting base for his computa- ons was the rate. In the absence of this set rate a PA would need to reconstruct a rate and to do this he ould have to have the type of knowledge which could e gained only by working in the area of the reimburse- ent system in the health care field.

IV. Discussion

It is undisputed that at the commencement of nego- ations, the Hospital through its representative, Ms. obfogel, claimed that it was unable to offer a wage ncrease due to its financial situation. Ms. Robfogel also ated at the same time that the Hospital recognized that was legally obligated to permit an examination of its nancial records by the Union. That such an obligation

exists is well settled.[6] However, notwithstanding its recognition of this obligation the Hospital placed restrictions on the Union's access to their financial records. The restrictions did not relate to the records, the Hospital did not refuse to disclose any particular record or records because they were confidential or were related to trade secrets. Nor did the Hospital contend that it would be burdensome to produce the records. As Respondent stated, "No evidence was introduced at the hearing to show that the Hospital placed any restrictions whatsoever on the information the CPA could review or communicate to Association representatives." The issue, therefore, is not whether Respondent violated the Act by refusing to disclose its records because they were confidential, contained trade secrets or because it would be burdensome to produce them. The issue is whether the Hospital can require the Union's representative to meet certain criteria, determined by it, before permitting the representative selected by the Association to examine admittedly relevant material.

Respondent contends that it has the right to require the Union's representative to meet its qualifications before permitting an examination of its books. In support of this position it cites both Supreme Court decisions and Board cases in which it claims that the Court and the Board have recognized instances when an employer was entitled to make a conditional offer of disclosure, although the employer had claimed an inability to pay a wage increase. Such a situation exists in the present case, according to Respondent.

Further, The Respondent argues that the qualifications it required the Association's representative to possess were not *"per se"* unreasonable and it was willing to discuss, with the Union representatives, any changes in the requested criteria. Finally, Respondent argues that

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[6] *N.L.R.B. v. Truitt Mfg. Co.*, 351 N.S. 149.

the record discloses that Respondent acted in good faith in requiring the Union's representative to meet certain criteria and, therefore, it cannot be found to have violated the Act.

The counsel for the General Counsel and Charging Party argue that the Hospital cannot place restrictions on the right of the Union to select a representative of its choice. Moreover, they maintain that the qualifications required by Respondent before it will permit an examination of its records are unreasonable on their face and establish that Respondent is bargaining in bad faith.

Section 7 of the Act states as follows:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively *through representatives of their own choosing.* (underscoring added)

The languate cited above demonstrates that Congress believed that effective collective bargaining could be conducted only if employees were free to choose their own representative. The instant case arose in the context of collective bargaining and the employees, through their Union representative, designated a certified public accountant considered by them to be "eminently qualified" to conduct, on their behalf, an examination of Respondent's records. Respondent, however, was concerned that this representative, although a certified public accountant, would not arrive at the same conclusion that their representative had arrived at and they, therefore, refused to permit their books and records to be examined. In effect, Respondent wants to sit on both sides of the bargaining table. The type of control which Respondent seeks to exercise over the Union's representative is in conflict with the purposes of Congress as set forth in Section 7 of the Act.

In *Oates Bros., Inc.*, 135 NLRB 1295, 1977 (1962) an employer insisted that the steward selected by the union be subject to its approval. The Board, in finding that such insistence constituted a violation stated, "It is well established that in the absence of special circumstances, an employer does not have the choice either affirmative or negative as to who is to represent employees for any purpose of collective bargaining. Similarly, in *Sears Roebuck & Co., Inc.*, Inc., 139 NLRB 471, 475 (1962) when a company refused to meet with the representative chosen by the union because of its belief that he would inject national issues into local bargaining, the Board adopted the Trial Examiner's position that an employer could not dictate to a labor organization the choice of its representative. The concept that the Union is entitled to choose its representative was stated again in *Proctor & Gamble Mfg. Co.*, 237 NLRB 747, 750, 751 (1978). Thus, the Administrative Law Judge, with Board approval, stated, "It is the Union which is entitled to the information and for the Union, not the Respondent, to decide who in its organization is to receive the documents, who is to be consulted and who is to decide whether to take the grievance to arbitration."

The Board did not find that the company violated the Act when it refused to bargain with the union's representative in *Fitzsimmons Manufacturing Company*, 251 NLRB 375, 379 (1980). However, in that case the Board based its decision on the fact that the union representative in question previously had engaged in misconduct. The Board, in *Fitzsimmons*, did state, however, the following, "It is well established that each party to a collective bargaining relationship has both the right to select its own representative for bargaining and negotiations and the duty to deal with the chosen representative of the other party." In *Winona Industries, Inc.*, 257 NLRB 695, 698 (1981) the Board also found a violation

of Section 8(a)(5) and (1) of the Act when a company refused to allow an inplant inspection by an industrial hygienist designated by the Union. Thus, both the language of the Act and Board decisions establish that the selection of a Union representative is an internal matter, over which an employer, generally, has no control.[7]

Respondent argues, however, as noted, that Supreme Court decisions and Board law recognize that there are situations when a union's interest in arguably relevant information must give way to other legitimate interests. The majority of the cases cited by Respondent in support of its proposition deal with circumstances where an employer has refused to disclose material because it was confidential, involved trade secrets or would be burdensome to produce. The Courts and the Board always have been concerned with balancing the Section 7 rights of employees to have relevant information with the legitimate concerns of employers that the production of such information would be detrimental. We are not dealing with that type of legitimate concern in the instant case. Here, Respondent refused to permit the examination of its records because it claims that an individual not versed in the New York State reimbursement system might reach incorrect conclusions as to the financial health of the Hospital and such erroneous conclusions could seriously damage the collective bargaining process. The difficulty with this argument is that the record fails to disclose evidence to support it. It is true that at several points during the hearing counsel for Respondent expressed such a concern and a Respondent witness attributed such remarks to Respondent counsel during the January 1983 negotiation session. However, other than these comments this record fails to disclose what impact, if any, there would have been on the negotiations if Union's representative reached conclusions different from

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[7] *Howland Hook Marine Terminal Corp.*, 263 NLRB No. 40 p. 5 (1982).

those reached by Respondent representatives. Further, the record fails to disclose that the Union refused to discuss with Respondent whatever conclusions Odendahl might arrive at prior to the disclosure of this information to bargaining unit employees. In fact, the Union's letter of December 1982 stated that the Union was prepared to discuss any question the Hospital representative might have regarding Odendahl's report when he completed his audit. There is no evidence in this record to warrant the conclusion that the Union was prepared to act recklessly, or without affording the Respondent an opportunity to explain the differences, if any in fact existed, before communication with unit employees. Nor does the record establish that the registered nurses involved herein were prepared to act recklessly.

However, asuming that both of the problems envisaged by Respondent were to occur, i.e. that Odendahl would reach erroneous conclusions and this would hamper the collective bargaining process, this record does not establish that the criteria set by Respondent in its letter of November 13, 1982, were reasonable. In the first instance, it should be noted that Respondent, failed to establish how it arrived at the criteria it set forth in its letter of November 13, 1982.[8] Rotenberg, Respondent's witness, testified that he was not approached by Respondent about what qualifications were necessary until a few weeks before the hearing.

In *Yakima Frozen Foods*, 130 NLRB 1269 (1961) cited by Respondent, the emplyer claimed an inability to pay and offered to disclose its records under certain conditions. The Board in that case stated the issue to be whether an employer violates the Act when it refuses to permit a union to make a *general* inspection of its

[8] The record does not disclose whether the Respondent's representative who made the decision about the institution's inability to pay possessed any of the criteria Respondent sought to impose on the Union's representative.

books and records and by insisting instead that the books and records be audited by a *qualified accountant not in the union's employ.* The Board stated that it did not find these criteria to be unduly restrictive. In this case the Union did not seek a general inspection of the Hospital's books but outlined the specific documents it sought to examine. Moreover, the Union stated that it was prepared to have Respondent's financial records examined by a certified public accountant, not in its employ. Thus, the Union has met the criteria found permissable in *Yakima.* In *Manitowoc Company, Inc.*, 186 NLRB 944, 1006 (1970) the Board found that the employer did not violate the Act when it stated that it would permit an examination of its books by an independent accountant after a casual request by the Union for such an examination. However, it should be noted that the Trial Examiner was not faced there with an admitted claim of inability to pay. Thus, he stated, "Assuming *arguendo* that Respondent's position with respect to its economic condition was such that it had the legal obligation to supply the financial date upon appropriate request, I find that its actions in this regard fulfilled that obligation." In this case, there is an admitted claim of inability to pay and the Union has offered to have the books examined by an independent accountant.

Respondent, however, was not satisfied with the Union's representative, although he was an independent certified public accountant. It sought additional qualifications which it contends were necessary before its records could be examined. The fact that these additional qualifications were unnecessary is demonstrated by Respondent's own actions. In April 1983 after the parties had been at odds over the issue for several months Respondent abandoned the criteria set out in its letter of November 1982. More specifically, Respondent, in its April 1983 letter advised the Union that it could "ignore" the various criteria contained in the November 1982

letter.[9] It is extremely unlikely that the Respondent would have stated that the criteria could be "ignored" if, in fact, they had been necessary in the first place.[10] Further, with respect to the actual criteria contained in the November 1982 letter, Rotenberg testified that all CPA's are eligible for membership in the AICPA and that any CPA certified by the State of New York can join the New York Society of CPA's. He also testified that he did not consider management auditing experience a necessary qualification for an auditor to possess in order to verify an employer's claim of an inability to pay. He further testified that while he considered practical experience in the reimbursement field to be the best method to secure the necessary knowledge to audit the Hospital's financial records, he would not say that such knowledge could not be gained by research and reading. Basically, Rotenberg did not believe that a CPA should reveal the name of the clients for whom he provided services without the client's authorization, nor did he believe that the nature of service performed should be disclosed, unless the service was of a routine type. Rotenberg acknowledged that under the code of AICPA a CPA was not to undertake an assignment unless he was of the opinion that he could perform the work competently. In sum, many of the qualifications contained in the November 1982 letter, according to Rotenberg, were either not necessary or required the disclosure of information that could not be disclosed. It should be noted that the criteria Rotenberg thought necessary for a

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[9] It is unclear whether the retention of Rotenberg had an impact on this decision.

[10] Moreover, the possession of the criteria set forth in the November 1982 letter was not a guarantee that future predication made by the possessor of such qualifications would be accurate. Assuming that the Respondent's representative who made the decision, about the inability to pay, possessed the criteria, the record reveals that his predications were not correct. In May 1983 the Respondent offered a pay increase, notwithstanding the earlier predictions.

proper audit of the Hospital's books and records were not the same, in many respects, as those contained in the November 1982 letter.

With respect to the revised criteria in the April 1983 letter Rotenberg described the request as more complex than necessary, although not unreasonable. He also termed the request for the disclosure of the basis of the auditor's knowledge as requiring information that was embarrassing, if not impossible to produce.

The statute and Board decisions make clear that the selection of a representative is a matter within the control of the Union, absent unusual circumstances. I do not find such circumstances present in the instant case. Further, assuming that circumstances did exist which would permit the Respondent to impose certain conditions before permitting an examination of its books, it is evident from Respondent's conduct and the testimony of its witnesses that the criteria contained in the November 1982 letter and the April 1983 were neither necessary nor reasonable. In these circumstances, I find that Respondent by denying the Union's request for an examination of its books and records by the certified public accountant selected by the Union has bargained in bad faith and has violated Section 8(a)(5) and (1) of the Act.

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has refused to bargain in good faith and has violated Section 8(a)(5) and (1) of the Act by refusing to permit the Union's representative an opportunity to examine its books and records although it has claimed an inability to pay a wage increase.

5. The aforesaid unfair labor practice is an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

Having found that Respondent violated Section 8(a)(5) and (1) of the Act, I recommend that it be ordered to cease and desist therefrom and from in any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act. I also recommend that Respondent be ordered to take certain affirmative action necessary to effectuate the policies of the Act.

On the basis of the foregoing findings of fact and conclusions of law and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER [11]

The Respondent, St. Joseph's Hospital, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain in good faith with New York State Nurses Association (Union) by denying the Union's request for an examination of the Hospital's financial books and records by a representative designated by the Union to investigate the claim of an inability to pay a wage increase.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the

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[11] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

rights guaranteed them in Section 7 of the National Labor Relations Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Upon request, permit an examination of its financial books and records by the Union's representative.

(b) Post at the Hospital, Elmira, New York, copies of the attached notice marked "Appendix." [12] Copies of said notice, on forms provided by the Regional Director for Region 3, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 3, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

Dated, Washington, D.C. September 26, 1983.

/s/ Winifred D. Morio
WINIFRED D. MORIO
Administrative Law Judge

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[12] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

"APPENDIX"

NOTICE TO EMPLOYEES

[SEAL] [SEAL]

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE
UNITED STATES GOVERNMENT

WE WILL NOT refuse to bargain in good faith with the New York State Nurses Association (Union) by dening the Union's request for an examination of our financial books and records by a representative designated by the Union to investigate our claim of an inability to pay a wage increase.

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in the exercise of the rights guaranteed to them in Section 7 of the Act.

WE WILL upon request permit an examination of our financial books and records by a representative designated by the Union to investigate our claim of an inability to pay a wage increase.

ST JOSEPH'S HOSPITAL
(Employer)

Dated: _____ By: _____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be

directed to the Board's Office, National Labor Relations Office,

National Labor Relations Board
Region 3
Federal Building—Room 901
111 W. Huron Street
Buffalo, N.Y. 14202 Tel. No. (716) 846-4951

APPENDIX C

ıe National Labor Relations Act provisions relevant to is matter are Section 7 [29 U.S.C. § 157] and 8 [29 S.C. § 158] which are reproduced below in pertinent rt:

7 Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . .

8(a) It shall be an unfair labor practice for an employer

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

. . .

(5) to refuse to bargain collectively with the representatives of his employees, . . .

. . .

8(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain

collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased

to be the representative of the employees subject to the provisions of section 9(a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within any notice * period specified in this subsection, or who engages in any strike within the appropriate period specified in subsection (g) of this section, shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer. Whenever the collective bargaining involves employees of a health care institution, the provisions of this section 8(d) shall be modified as follows:

(A) The notice of section 8(d)(1) shall be ninety days; the notice of section 8(d)(3) shall be sixty days; and the contract period of section 8(d)(4) shall be ninety days.

(B) Where the bargaining is for an initial agreement following certification or recognition, at least thirty days' notice of the existence of a dispute shall be given by the labor or-

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* Pursuant to Public Law 93-360, 93d Cong., S. 3203, 88 Stat. 396, the last sentence of Sec. 8(d) is amended by striking the words "the sixty-day" and inserting the words "any notice" and by inserting before the words "shall lose" the phrase ", or who engages in any strike within the appropriate period specified in subsection (g) of this section." In addition, the end of paragraph Sec. 8(d) is amended by adding a new sentence "Whenever the collective bargaining . . . aiding in a settlement of the dispute."

ganization to the agencies set forth in section 8(d)(3).

(C) After notice is given to the Federal Mediation and Conciliation Service under either clause (A) or (B) of this sentence, the Service shall promptly communicate with the parties and use its best efforts, by mediation and conciliation, to bring them to agreement. The parties shall participate fully and promptly in such meetings as may be undertaken by the Service for the purpose of aiding in a settlement of the dispute.

§ 8(g) a labor organization before engaging in any picketing, striking, or other concerted refusal to work at any health care institution shall, not less than ten days prior to such action, notify the institution in writing and the Federal Mediation and Conciliation Service of that intention, except that in the case of bargaining for an initial agreement following certification or recognition the notice required by this sentence shall not be given until the expiration of the period specified in clause (B) of the last sentence of section 8(d) of this Act. The notice shall state the date and time that such action will commence. The notice, once given, may be extended by the written agreement of both parties.

Office-Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

No. 84-1998

In The

Supreme Court of the United States

October Term, 1984

NEW YORK STATE NURSES ASSOCIATION,
Petitioner,

vs.

ST. JOSEPH'S HOSPITAL,

and

NATIONAL LABOR RELATIONS BOARD,
Respondents.

BRIEF OF RESPONDENT ST. JOSEPH'S HOSPITAL IN OPPOSITION

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Daily Record Corporation
Rochester, New York
(11724)

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QUESTION PRESENTED

Whether Respondent St. Joseph's Hospital violated sections 8(a)(1) and (5) of the National Labor Relations Act when it insisted that it had the right to negotiate with the Petitioner over the conditions under which the Petitioner could examine Respondent's books and records to verify a claimed inability to pay a wage increase?

TABLE OF CONTENTS

	Page
Question Presented	*i*
Table of Contents	*ii*
Table of Authorities	*iii*
Statement of the Case	2

REASONS FOR DENYING WRIT

I. THE DECISION OF THE COURT OF APPEALS WAS ENTIRELY CONSISTENT WITH THE DECISIONS OF THIS COURT	2
II. PETITIONER HAS NOT DEMONSTRATED THAT A CONFLICT EXISTS AMONG THE CIRCUIT COURTS OF APPEALS	4
III. THIS CASE PRESENTS NO SPECIAL OR IMPORTANT ISSUES REQUIRING THIS COURT'S ATTENTION	6
Conclusion	9

TABLE OF AUTHORITIES

Cases	Page
Detroit Edison Company v. National Labor Relations Board, 440 U.S. 301 (1979)	3, 4, 5
Emeryville Research Center, Shell Development Co. v. National Labor Relations Board, 441 F.2d 880 (9th Cir. 1971)	5
Fitzsimmons Manufacturing Co., 251 N.L.R.B. 375 (1982)	7
Howland Hook Marine Terminal Corp., 263 N.L.R.B. 453 (1982)	7
Metlox Manufacturing Company v. National Labor Relations Board, 378 F.2d 728 (9th Cir. 1967), *enf'g*, 153 N.L.R.B. 1388 (1965), *cert. denied*, 389 U.S. 1037 (1968)	4, 7
Metlox Manufacturing Co., 153 N.L.R.B. 1388 (1965), enf'd, 378 F.2d 728 (9th Cir. 1967), *cert. denied*, 389 U.S. 1037 (1968)	7
National Labor Relations Board v. Acme Industrial Co., 385 U.S. 432 (1967)	3, 4
National Labor Relations Board v. Tex-Tan, Inc., 318 F. 2d 472 (5th Cir. 1963), *denying enforcement*, 134 N.L.R.B. 253 (1961)	5
National Labor Relations Board v. Truitt Manufacturing Co., 351 U.S. 149 (1956)	3, 4
Oates Brothers, Inc., 135 N.L.R.B. 1295 (1962)	7
Sears Roebuck & Co., Inc., 139 N.L.R.B. 471 (1962)	7
Shell Oil Co. v. National Labor Relations Board, 457 F. 2d 615 (9th Cir. 1972)	5

Page

Westfork Cut Glass Co., 90 N.L.R.B. 944 (1950), *enforced as modified sub nom. National Labor Relations Board v. Borchert*, 188 F.2d 474 (4th Cir. 1951) . 6

Winona Industries, Inc., 257 N.L.R.B. 695 (1981) 8

Yakima Frozen Foods, 130 N.L.R.B. 1269 (1961), *enforced in part and remanded in part sub nom. Fruit and Vegetable Packers and Warehousemen, Local 760 v. N.L.R.B.*, 316 F. 2d 389 (D.C. Cir. 1963) 5, 6

Statutes

National Labor Relations Act §8(a) 2

In The

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NEW YORK STATE NURSES ASSOCIATION,
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vs.

ST. JOSEPH'S HOSPITAL,
and
NATIONAL LABOR RELATIONS BOARD,
Respondents.

BRIEF OF RESPONDENT ST. JOSEPH'S HOSPITAL IN OPPOSITION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Respondent St. Joseph's Hospital[1] respectfully requests that this Court deny the Petition for a Writ of Certiorari.

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[1] Pursuant to U.S. Sup. Ct. Rule 28.1, St. Joseph's Hospital has no parent companies, subsidiaries or affiliates.

STATEMENT OF THE CASE

All of the relevant facts are more fully and accurately set forth by the Court of Appeals for the Second Circuit in its decision than they are in the Petition for a Writ of Certiorari. The court's decision is officially reported at 755 F.2d 260, and is attached as Appendix A to the Petition.

Petitioner filed an unfair labor practice charge with the National Labor Relations Board (hereinafter "Board") on December 17, 1982 alleging that Respondent St. Joseph's Hospital (hereinafter "the Hospital" or "Respondent") had violated sections 8(a)(1) and (5) of the National Labor Relations Act (hereinafter "the Act"). A hearing before Administrative Law Judge (hereinafter "ALJ") Winifred Morio was held on May 26, 1983. The ALJ issued a decision and recommended order in September, 1983 finding the Hospital had refused to bargain in good faith and ordering the Hospital to permit the union's representatives to examine its financial records. The Board affirmed the ALJ's decision without opinion. On June 7, 1984, the Board petitioned the Second Circuit Court of Appeals for enforcement of its Order. Petitioner intervened.

On February 14, 1985, the Second Circuit denied enforcement of the Board's Order. Contrary to Petitioner's characterization of the decision, the Court of Appeals held that the Hospital had not refused to bargain in good faith when it proposed certain qualifications to be met by Petitioner's auditor before the auditor would be permitted to examine the Hospital's financial records.

REASONS FOR DENYING WRIT

I. THE DECISION OF THE COURT OF APPEALS WAS ENTIRELY CONSISTENT WITH THE DECISIONS OF THIS COURT.

The Court of Appeals for the Second Circuit faithfully applied the principles previously enunciated by this Court. Indeed, the Second Circuit explicitly relied upon this Court's holdings in *Na-*

tional Labor Relations Board v. Truitt Manufacturing Co., 351 U.S. 149 (1956) and *Detroit Edison Co. v. National Labor Relations Board*, 440 U.S. 301 (1979).

Petitioner implicitly acknowledges that there is no direct conflict with the holdings in *Truitt*, *Detroit Edison*, and *National Labor Relations Board v. Acme Industrial Co.*, 385 U.S. 432 (1967) by arguing only that the "broad principles" stated in those cases have been "improperly eroded" by the Second Circuit's decision. Both *Truitt* and *Acme* involved an employer's absolute refusal to provide information to a union, an issue entirely absent from the present case. *See* Petition, Appendix A at p.9a. Moreover, in *Truitt*, this Court explicitly rejected the existence of any automatic right of employees to evidence substantiating an employer's claimed inability to pay a wage increase, stating that "[e]ach case must turn upon its particular facts." 351 U.S. at 153.

Detroit Edison provides strong support for the Court of Appeals' decision. In that case, this Court recognized the existence of situations where an employer's conditional offer to disclose information is warranted. The employer had refused to disclose to the union actual test questions, answer sheets and personally identifiable scores of employee aptitude tests unless the employees involved gave consent. As a compromise, the employer suggested that the test battery and answer sheets be given to an industrial psychologist selected by the union for independent evaluation. Both the Board and the Sixth Circuit ordered the employer to turn over all requested material directly to the union, concluding that the union should be able to decide for itself whether it needed a psychologist to interpret the test battery and answer sheet. This Court reversed, holding that the Board had abused its discretion, stating:

> The Board's position appears to rest on the proposition that Union interests in arguably relevant information must always predominate over all other interests, however legitimate. But such an absolute rule has never been established

> and we decline to adopt such a rule here. There are situations in which an employer's conditional offer to disclose may be warranted.

440 U.S. at 318. Petitioner argues for such an "absolute rule" in the present case.

Nothing stated in *Truitt*, *Acme*, or *Detroit Edison* even implies that an employer may not propose that the union's accountant meet certain qualifications where the employer legitimately fears that labor strife may result from an inaccurate forecast of the employer's income by an unqualified auditor. Petitioner's inability to indicate an arguable conflict demonstrates that the Court of Appeals' decision in this case is in all respects consistent with the prior decisions of this Court and does not merit the Court's attention.

II. PETITIONER HAS NOT DEMONSTRATED THAT A CONFLICT EXISTS AMONG THE CIRCUIT COURTS OF APPEALS.

Petitioner's strained argument that the Court of Appeals' decision conflicts with decisions in other Circuits is also meritless. The cases cited by Petitioner do not involve facts or issues comparable to those presented here.

In *Metlox Manufacturing Company v. National Labor Relations Board*, 378 F.2d 728 (9th Cir. 1967), *enf'g*, 153 N.L.R.B. 1388 (1965), *cert. denied*, 389 U.S. 1037 (1968), the employer was found guilty of refusal to bargain, not because it required that the person examining its books be a certified public accountant approved by the employer, but because it was willing to allow access to its records only if the accountant was limited to informing the union whether the company's profit and loss statements "were true". The Ninth Circuit upheld the Board's finding that it was inconsistent with good faith bargaining for the company to insist upon limiting the accountant's disclosure to the union to a naked "yes or no" answer as to whether the profit and loss state-

ments furnished by the company fairly reflected the company's financial condition. That case did not hold that *all* limits on disclosure were unlawful; nor did it involve legitimate employer concern regarding the ability of the union's auditor to project the employer's earnings based on a complex reimbursement system. Thus, *Metlox* does not conflict with the Court of Appeals' decision in this case.

Petitioner also contends that the decision in *National Labor Relations Board v. Tex-Tan, Inc.*, 318 F.2d 472 (5th Cir. 1963), *denying enforcement*, 134 N.L.R.B. 253 (1961) conflicts with the decision below. Any conflict is illusory because, as Petitioner recognizes, the Fifth Circuit rejected the Board's finding that the employer had withheld certain information from the Union. 318 F.2d at 478. Thus, that Court never decided whether an employer would violate the Act by failing to explain technical information to Union representatives. Any statement by the Fifth Circuit to this effect was *dicta*. Consequently, there was no "decision" on this issue which could conflict with that of the Second Circuit in the present case. Moreover, even if there had been a decision to this effect, no conflict would exist. In the present case, the Hospital did not seek to deny relevant information to Petitioner due to its complexity. Rather, it sought to insure that Petitioner would get an accurate explanation of that information - an aim which furthers the principle for which Petitioner cites *Tex-Tan*.

Nothing better demonstrates the absence of a conflict among the Circuits than Petitioner's labored efforts to find one with *Tex-Tan*. Furthermore, the Second Circuit's decision is wholly consistent with decisions by several Circuit Courts of Appeals recognizing the employer's right to propose and bargain with respect to the conditions under which it will disclose certain information. *See, e.g., Detroit Edison Co. v. N.L.R.B.*, 440 U.S. 301 (1979); *Shell Oil Co. v. N.L.R.B.*, 457 F.2d 615 (9th Cir. 1972); *Emeryville Research Center, Shell Development Co. v. N.L.R.B.*, 441 F.2d 880 (9th Cir. 1971); *Yakima Frozen Foods*,

130 N.L.R.B. 1269 (1961), *enforced in part and remanded in part sub nom. Fruit and Vegetable Packers and Warehousemen, Local 760 v. N.L.R.B.*, 316 F.2d 389 (D.C. Cir. 1963); *Westfork Cut Glass Co.*, 90 N.L.R.B. 944 (1950), *enforced and modified on other grounds sub nom. N.L.R.B. v. Borchert*, 188 F.2d 474 (4th Cir. 1951).

Inasmuch as this case is not comparable to those cited by Petitioner, it is not representative of a conflict and need not be reviewed on that basis.

III. THIS CASE PRESENTS NO SPECIAL OR IMPORTANT ISSUES REQUIRING THIS COURT'S ATTENTION.

Petitioner warns that the decision below will result in an "opportunity" for employers to frustrate and delay the collective bargaining process. These unsubstantiated fears do not call for this Court's review.

The Court of Appeals explicitly held that there had not been even an allegation that the Hospital raised its concerns in bad faith (Petition, Appendix A at p. 9a). Furthermore, as discussed above, the courts and the Board have repeatedly recognized certain situations in which an employer may condition the release of information to unions.

In addition, it is ironic that Petitioner should warn of an outbreak of dilatory bargaining tactics when Petitioner itself - and only the Petitioner - intentionally delayed bargaining for months by refusing to even discuss the Hospital's concerns. These actions prompted the Court of Appeals to hold that "such 'stonewalling' by a union should not be rewarded through enforcement action against the hospital." (Petition, Appendix A at p. 11a). Under the circumstances, these speculative fears of bargaining delays do not warrant review by this Court.

Petitioner also argues that the decision below makes an improper distinction between employees' representatives chosen for collective bargaining purposes and those chosen for other purposes. Again, the Union is straining to find a "special or important issue" where none exists. The Board has long recognized that an expert hired by a union to verify a claimed inability to pay has a function separate and distinct from that of a bargaining representative. Board decisions establishing a union's unfettered right to choose its representatives have dealt only with employee advocates such as union stewards or collective bargaining representatives. *E.g., Howland Hook Marine Terminal Corp.*, 263 N.L.R.B. 453 (1982); *Fitzsimmons Manufacturing Co.*, 251 N.L.R.B. 375 (1980); *Sears Roebuck & Co., Inc.*, 139 N.L.R.B. 471 (1962); *Oates Brothers, Inc.*, 135 N.L.R.B. 1295 (1962). In contrast, Petitioner's auditor did not act as an advocate or negotiator for unit employees and, therefore, can hardly be categorized as their "representative".

The auditor would not negotiate with the Hospital nor should he act as an advocate. The Board has held that a union is not entitled to review employer records for the purpose of enabling the union to suggest or urge efficiency or other changes which could make more funds available for wages. *Metlox Manufacturing Co.*, 153 N.L.R.B. 1388, 1395 (1965), *enf'd*, 378 F.2d 728 (9th Cir. 1967), *cert. denied*, 389 U.S. 1037 (1968). An auditor's purpose is merely to determine if the Hospital's position, at the time it was put forth, is supported by the information contained in the records he reviews. *See Metlox Manufacturing Co. v. N.L.R.B.*, 378 F.2d 728, 729 (9th Cir. 1967), *cert. denied*, 389 U.S. 1037 (1068). Thus, the auditor does not fall into the same category as a union steward or bargaining representative, and the establishment of qualifications to ensure his expertise does not conflict with the purposes of the Act.

Respondent submits that the distinction drawn by the Court of Appeals between bargaining representatives and Petitioner's au-

ditor is not novel and, moreover, is logical, correct and in accord with the principles of the Act. Indeed, the Board has itself indicated that the selection of similar information analysts is an appropriate subject of bargaining. *See Winona Industries, Inc.*, 257 N.L.R.B. 695, 697-98 (1981) (union's selection of an industrial hygienist for analysis of employer safety and health information termed an appropriate subject of bargaining). Consequently, this issue does not require the attention of this Court.

Finally, Petitioner alleges that the Court of Appeals denied the Board its due deference. However, Petitioner does little more than mention this issue. There is no discussion of any specific infirmity in the Court of Appeals' approach. In fact, the Court of Appeals explicitly examined the appropriate scope of review and its decision reflects strict adherence to that standard. The Court of Appeals concluded that the Board's decision lacked substantial evidentiary support (Petition, Appendix A at p. 12a), and Petitioner has not demonstrated otherwise.

Accordingly, Petitioner has failed to raise any special or important issues which warrant this Court's attention.

CONCLUSION

For the foregoing reasons, Respondent respectfully submits that the Petition for a Writ of Certiorari should be denied.

Dated - July 15, 1985

Respectfully submitted,

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No. 84-1998

In the Supreme Court of the United States

OCTOBER TERM, 1985

NEW YORK STATE NURSES ASSOCIATION, PETITIONER

v.

ST. JOSEPH'S HOSPITAL AND
NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

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7 pp

TABLE OF AUTHORITIES

Page

Cases:

Detroit Edison Co. v. *NLRB*, 440 U.S. 301 ..... 3, 4, 5

Universal Camera Corp. v. *NLRB*, 340 U.S. 474 5

Yakima Frozen Foods, 130 N.L.R.B. 1269, enforced *sub nom. Fruit & Vegetable Packers, Local 760* v. *NLRB*, 316 F.2d 389 4

Statutes:

National Labor Relations Act, 29 U.S.C. 151 *et seq.* :

§ 7, 29 U.S.C. 157 3

§ 8(a)(1), 29 U.S.C. 158(a)(1) 2

§ 8(a)(5), 29 U.S.C. 158(a)(5) 2

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MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

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1. During bargaining negotiations in November 1982, respondent St. Joseph's Hospital (the Hospital) claimed that it could not offer a wage increase because of its financial condition. The Hospital admitted that petitioner (the Union) was entitled to examine the Hospital's financial books and records to verify the accuracy of that claim. The Union requested specific financial records which concededly were relevant to evaluating the Hospital's inability to pay. The Hospital, however, refused to disclose any of the requested records unless and until the Union selected a certified public accountant who met certain qualifications enumerated by the Hospital[1] (Pet. App. 2a-6a, 18a-20a).

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[1]Initially, the Hospital offered to permit a "mutually acceptable qualified CPA" to review its financial records. Thereafter, the Hospital gave the Union a list of specific qualifications that the CPA had to meet

2. The Board, upholding the decision of the administrative law judge (ALJ), found that the Hospital violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1), by refusing to permit the Union's accountant to examine its records as a means of verifying the Hospital's claimed inability to pay a wage increase (Pet. App. 14a, 35a).

The ALJ noted that "[t]he Courts and the Board always have been concerned with balancing the Section 7 rights of employees to have relevant information with the legitimate concerns of employers that the production of such information would be detrimental" (Pet. App. 31a). However, the ALJ found no evidence that release of the requested data to the accountant chosen by the Union would be detrimental to the Hospital (*id.* at 31a-32a). The ALJ further concluded that, even if the Hospital had shown that release of the

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to be acceptable to the Hospital — including "[d]emonstrated knowledge of the New York State Hospital Reimbursement Regulations" (Pet. App. 20a). On November 17, 1982, the Union designated a CPA, but the Union did not indicate the CPA's qualifications or whether he possessed any of the qualifications demanded by the Hospital. On November 24, the Hospital responded, agreeing to the date suggested by the Union for examination of the records but insisting on prior proof that the accountant met the stipulated criteria. On December 1, the Union, by letter, cancelled the scheduled bargaining sessions in light of the Hospital's refusal to accept its accountant, stated that its accountant was "eminently qualified" and added that the Hospital would be able to examine and question his analysis of the records. *Id.* at 21a-22a. During the next five months, although the parties continued to negotiate on substantive issues, they remained at odds on who should review the records. The Hospital took the position that an accountant unfamiliar with the methodologies of the New York State reimbursement system might deliver a misleading report. The Hospital reiterated its willingness to discuss or negotiate any of the specific qualifications that were unacceptable to the Union. In April 1983, the Hospital modified its enumerated qualifications. Throughout the negotiations the Union took the position that it had the right to send in any auditor it chose to examine the financial records. Accordingly, the Union rejected as unreasonable all the qualifications demanded by the Hospital. *Id.* at 22a-23a.

requested information to the Union's chosen accountant would be detrimental by "reach[ing] erroneous conclusions [that] would hamper the collective bargaining process" (*id.* at 32a), the selection criteria for an acceptable accountant imposed by the Hospital were not reasonably related to any such concerns (*id.* at 33a-35a). The ALJ also concluded that the Hospital's insistence upon certain qualifications interfered with the employees' Section 7, 29 U.S.C. 157, right to select their own bargaining representative (Pet. App. 29a-31a). Accordingly, the ALJ recommended, and the Board ordered, inter alia, that the Hospital "permit an examination of its financial books and records by the Union's representative" (*id.* at 37a).[2]

3. The court of appeals denied enforcement of the Board's order, finding that it was not supported by substantial evidence (Pet. App. 12a).

Citing *Detroit Edison Co.* v. *NLRB*, 440 U.S. 301 (1979), the court stated (Pet. App. 8a) that, where an employee asserts a " 'legitimate and substantial' justification for limiting * * * disclosure," a " 'conditional offer to disclose may be warranted' " even where concededly relevant information is sought by the union. The court found that the Hospital's concern about "labor strife if an unqualified accountant erroneously should report that the hospital could pay a wage increase" was "legitimate and reasonable" (*id.* at 9a-10a). The court further found that "the hospital repeatedly offered to meet with the union to discuss any requirements that the union felt were unreasonable[,]" while "the union ignored the hospital's offer to discuss the

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[2]The Board modified the ALJ's recommended order to require disclosure only in future negotiations, as the parties had reached agreement on a new contract after the close of the unfair labor practice hearing (Pet. App. 13a n.1).

criteria and simply stated that the criteria were all unreasonable — without advancing a single specific objection" (*id.* at 10a). The court concluded (*id.* at 11a):

> under the circumstances of this case, where the hospital's concern over qualifications of the auditor were legitimate and substantial, and where the union rejected all attempts at discussion of the point, made an unsupported categorical objection that all suggested criteria were unreasonable, and insisted that it could appoint anyone it chose to audit the hospital's records, there was insufficient evidence to support the board's conclusion that the hospital had failed to bargain in good faith. [3]

4. As this Court noted in *Detroit Edison Co.* v. *NLRB*, 440 U.S. at 318, "[t]here are situations in which an employer's conditional offer to disclose [relevant information] may be warranted." And see *Yakima Frozen Foods*, 130 N.L.R.B. 1269, 1272-1273 (1961), enforced in relevant part *sub nom. Fruit & Vegetable Packers, Local 760* v. *NLRB*, 316 F.2d 389 (D.C. Cir. 1963) (offer of employer faced with a strike to disclose financial records to an independent accountant but not directly to the union was justified by legitimate concern that the union would engage in secondary boycotts if the union learned the employer's sources of supplies or consignees). The ALJ acknowledged that proposition (Pet. App. 31a), but concluded that in these circumstances the Hospital had not shown any legitimate or reasonable concern justifying its refusal to disclose the information at issue to the Union's chosen accountant.

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[3]The court disagreed with the Board that this case implicated the right of employees to select their own bargaining representative. The court stated (Pet. App. 12a) that "[i]t does not appear * * * that the auditor in these circumstances was intended to function as the union's bargaining representative as distinguished from a source of information."

While the Board believes that the court of appeals should have upheld that finding, the Board has not filed its own petition for a writ of certiorari because in its judgment the difference between the Board and the court presents essentially a factbound issue that does not warrant review by this Court.[4] *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

Respectfully submitted.

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JULY 1985

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[4]Petitioner asserts (Pet. 9) that "[t]he Court of Appeals held that the Hospital had the right to require that the person chosen by the [Union] to review the Hospital's books meet certain qualifications." However, the court did not hold that an employer may unilaterally impose conditions, even if reasonable. Rather, it held that, where the employer raises reasonable concerns about disclosure, the union is required to discuss those concerns in an attempt to reach a mutually agreeable solution. The court "recognize[d] that in some circumstances the parties, after reasonable attempts at negotiations, may be unable to reach agreement over appropriate qualifications. In such a case the Board, of course, may determine whether an unfair labor practice has been committed." Pet. App. 11a.

Petitioner also contends (Pet. 11) that the precedents of this Court establish that, while conditions may be placed in appropriate circumstances on release of information, they may not be placed on who the union may select to review information. However, in *Detroit Edison*, 440 U.S. at 316-317, the Court concluded that the Board had abused its discretion in requiring the employer to turn over certain information directly to the union, rather than to a professional psychologist (as the employer had offered to do), for only the latter course would adequately protect the employer's legitimate interest in the secrecy of the information.